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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1053

E. K. BEARDEN,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

ERNEST W. CRUMB,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RITTER & MCGUIRE
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January, 1970

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

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Under authority of Rule 23, paragraph 5, of the revised rules of the Supreme Court of the United States, this single petition for writ of certiorari covering both of the above styled cases will be filed for the reason that said cases involve identical questions.

OPINIONS BELOW

Reference is hereby made to the opinions of the Court of Criminal Appeals of the State of Oklahoma which are appended as petitioners' Exhibit I (Bearden) and petitioners' Exhibit II (Crumb). Petitioners' first petition for rehearing was overruled and each of the defendants discharged their trial counsel at this point and retained the law firm of Ritter & McGuire, Ardmore, Oklahoma, who filed a second petition for rehearing. This second petition for rehearing was denied on October 8, 1969, in each of the above styled cases. A copy of the order denying second petition for rehearing is appended and marked petitioners' Exhibit III (Bearden) and petitioners' Exhibit IV (Crumb). On October 27, 1969, the Court of Criminal Appeals of the State of Oklahoma issued an order staying the mandate pending appeal to the United States Supreme Court for a period of 30 days from October 24, 1969, or until November 24, 1969. On or about November 20, 1969, the Court of Criminal Appeals of the State of Oklahoma issued an order staying mandate pending appeal to the United States Supreme Court from November 24, 1969, to December 24, 1969. On December 24, 1969, the Court of Criminal Appeals of the State of Oklahoma issued a third order staying mandate pending appeal to the United States Supreme Court for an additional 30 days from December 24, 1969, to January 24, 1970.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C., Secs. 1257(2), (3), and 2101(c) and Rule 19 of the Supreme Court of the United States.

QUESTIONS PRESENTED

I

Whether or not a defendant in the trial court has been afforded counsel as guaranteed under the Sixth Amendment and due process of law under the Fourteenth Amendment to the United States Constitution when such counsel stands mute during the trial?

II

Whether or not a defendant voluntarily waives his constitutional rights when he accepts the advice of an attorney in good standing with the Oklahoma Bar Association?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional questions upon which this petition for certiorari is founded are based upon the Sixth Amendment to the Constitution of the United States, which is:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, which is:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The above two constitutional provisions were first raised in the Court of Criminal Appeals of the State of Oklahoma in petitioners' second petition for rehearing befor the Court of Criminal Appeals of the State of Oklahoma.

STATEMENT OF THE CASES

The above named petitioners, E. K. Bearden and Ernest W. Crumb, were each charged with the crime of murder. These charges involved separate incidents and the factual situations concerning each of their charges are different. However, the grounds upon which these petitioners rely for consideration of this Court in their prayer for a new trial are identical. After being charged, the petitioners both retained J. B. Champion, Jr., of Ardmore, Oklahoma, to defend them on the charge. The attorney for these petitioners was successful in gaining two continuances for these petitioners, one in May of 1967, and another in August of 1967. On October 20, 1967, petitioners filed a third motion for a continuance on the grounds that the attorney for said petitioners was physically unable to defend these petitioners at a jury trial. This third motion was overruled by the presiding judge. On October 25, 1967, petitioner Bearden was tried, and on October 26, 1967, the petitioner Ernest W. Crumb was tried, both by jury. The record reflects that the presiding judge had admonished both petitioners on the

second motion for a continuance, that no further continuances would be allowed; that if Mr. Champion was not physically able to go to trial they would have the opportunity to retain the services of another attorney; that if they were not financially able to employ another attorney, the court would appoint an attorney to defend them. Affidavits, which are attached to this petition, reveal that Mr. Champion, throughout all of the preliminary proceedings, advised these petitioners that they had nothing to worry about; that a conviction would not stand up even if they were convicted and that if these petitioners would stick with him (Champion), he would gain an acquittal. Mr. Champion, according to the affidavit, also advised them a court appointed attorney would be of no value whatsoever to them for the reason that they would not be qualified attorneys experienced in matters of this nature and to use a court appointed attorney would have the effect of gaining them a sure conviction. This advice and these admonitions were repeatedly made over a long period of time and had the effect of brainwashing two uneducated laymen. During the trial of each of these petitioners, their attorney elected to "stand mute." He did not conduct a *voir dire;* made no opening statements; did not cross-examine any of the State's witnesses; did not put on a witness in behalf of the petitioners' case; and did not make an argument on behalf of the petitioners. In the above styled case of the State of Oklahoma v. E. K. Bearden, the jury returned a verdict of guilty and assessed the punishment at 15 years. In the case of State of Oklahoma v. Ernest W. Crumb, the jury returned a verdict of guilty and assessed penalty at 25 years. The judgment and sentence in the Bearden case was af-

firmed by this Court. The judgment and sentence in the Crumb case was modified and affirmed as modified in that Crumb's sentence was reduced to 15 years. Mr. Champion filed a petition for rehearing before this Court and the same was denied. Thereupon, the mandate was issued in each of the above named and numbered cases and shortly thereafter, but prior to the time these petitioners were transported to the Oklahoma State Penitentiary at McAlester, this attorney filed a second petition for rehearing, motion to stay execution of mandate and motion for reconsideration. This Court issued its order staying execution of the mandate in each of the cases pending further order of this Court.

The actual facts precipitating the altercation in which each of the above named petitioners took the life of the Deceased, bear out that both have good strong defenses which were never presented to the court or jury in their purported trial.

In the Bearden case, it could be proven by competent evidence and with an abundance of testimony that the Deceased had on many occasions communicated threats on the life of E. K. Bearden; that not more than two days prior to the fatal shooting, the Deceased had administered a severe beating on Bearden; that the Deceased, immediately prior to the fatal shooting, had approached Bearden with a loaded rifle and had fired several shots at Bearden. The jury was not made aware of any of these facts or circumstances.

In Crumb's case, there is competent evidence to the effect that Crumb, the Deceased, and the mother of the De-

ceased, had been celebrating New Year's Eve; that the mother of the Deceased was a woman of bad repute; that Crumb had gone to bed and the mother and the Deceased had left his premises. Crumb was awakened by the mother of the Deceased and Crumb caught her in an attempt to steal his wallet. The testimony and evidence will show that he told the mother of the Deceased to get out and leave him alone, and that when he started to rise from the bed, he was knocked down by the Deceased. He was again knocked down by the Deceased on his second attempt to rise and when he finally gained his feet, the Deceased grabbed a shotgun that was leaning against the wall and threatened Crumb with the gun. The testimony would further show that Crumb attempted to take the gun away from the Deceased and that he was pushed back by the Deceased against a chest of drawers. A knife was lying on top of the chest and Crumb grabbed the knife and struck at the Deceased. He evidently stabbed the Deceased and the Deceased left the premises with his mother. The testimony will also show that Crumb then called the police and they arrived shortly thereafter and arrested the plaintiff in error. Testimony will further show that the mother of the Deceased had been jailed many times prior to this occasion for drunkenness and for taking money from men after getting them intoxicated.

The above set out facts are very brief and do not include all of the testimony that can be produced on their behalf; however, the main points as set out clearly indicate that each of these petitioners had and do have a good defense for the jury's consideration in the event a new trial is granted to them by this Court.

CONTENTION NO. I

THAT THESE PETITIONERS DID NOT MAKE A VOLUNTARY, OR INTELLIGENT, WAIVER OF THEIR RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Sixth Amendment to the Constitution of the United States affords the right of all defendants in criminal prosecutions, among other things, the right to have the Assistance of Counsel for his defense. These petitioners submit to this Honorable Court that the right to assistance of counsel contemplates competent and effective counsel. Although it is true that the trial court properly advised these petitioners that they were to be tried with or without Mr. Champion; that if they could not afford an attorney, they would be afforded a court appointed counsel, these petitioners were relatively uneducated laymen, neither of whom have completed high school, and were repeatedly coerced by Mr. Champion to "stay with him" throughout the proceedings and that to do otherwise would amount to a certain lengthy conviction.

The writer of this brief freely admits that these petitioners exercised bad judgment, but denies that they exercised this judgment freely, because of the interference of Mr. Champion. It appears to the writer of this brief that these petitioners had the absolute right to follow the advice of their attorney. This Honorable Court is well aware of the fact that the Oklahoma Bar Association has set standards for competency and integrity as a conditioned precedent to the right to practice law in the courts of the State of Oklahoma. The Oklahoma Bar Association and the Supreme

Court of the State of Oklahoma have also set standards of conduct and competency for any member of the Bar to continue practicing before the duly constituted courts of the State of Oklahoma. Therefore, it is respectfully submitted that by allowing anyone to practice in the State of Oklahoma is tantamount to an unqualified recommendation by the Bar and the Supreme Court of the State of Oklahoma; that that particular lawyer has met all standards required of him, both morally and intellectually, to advise his various clients. The layman has no other yardstick, and it, therefore, is the presumption that such counsel is competent; otherwise, he would not be in good standing at the Bar and accepted by the court. By allowing a lawyer to practice before the various courts of this State, the Oklahoma Bar Association and the Supreme Court have in essence warranted to the laymen, who might use their services, that such lawyer is eminently qualified, and that, therefore, his advice should be taken if he is to be employed. There is no argument to the fact that employment of a medical doctor is of no benefit or use if such doctor's advice is not followed. These petitioners had every right to depend upon the advice of Mr. Champion, who had had many many years of experience with criminal cases in the State of Oklahoma; who had defended, successfully, many capital cases; who had a reputation of being an outstanding trial lawyer; and whose intelligence and ability had been vouched for by the Oklahoma Bar Association and the Supreme Court of the State of Oklahoma by virtue of his being allowed to practice law in the State of Oklahoma.

Although a majority of the cases in the United States hold that an accused, in the exercise of a free and intelli-

gent choice, and with the considered approval of the court, may waive his constitutional rights. The very definition of "waiver" indicates that each case concerning the question of waiver should be considered separately and should stand on its merits. In the case of *Craig* v. *U. S. C. A.*, Ohio, 1954, 217 F.2d 355, the Court held:

> "A 'waiver' is ordinarily an intentional relinquishment or abandonment of a known right or privilege and determination whether there has been an intelligent waiver of right to effective assistance (6th Amendment), must depend in each case upon the particular facts and circumstances surrounding such case, including the background, experience and conduct of accused."

The writer of this brief has scanned many cases concerning waiver of constitutional rights and has failed to find any prior case where the facts are identical to the instant cases. In this case, an experienced trial lawyer repeatedly admonished these petitioners to refuse a court appointed attorney; he repeatedly and over a long period of time advised them that to accept the services of a court appointed attorney would result in a sure conviction; he advised them that if they would stick with him, there would be no conviction. Therefore, it cannot be said that these petitioners made a *voluntary* waiver of effective assistance of counsel.

CONTENTION NO. II

THAT THESE PETITIONERS WERE DENIED DUE PROCESS OF LAW FOR THE REASON THAT THEIR COUNSEL'S REPRESENTATION WAS SO INADEQUATE AS TO MAKE THE TRIAL A FARCE AND MOCKERY OF JUSTICE.

Practically all the courts have taken the position that mere lack of experience, unskillfulness, lack of preparation or of interest, inadequacy or incompetency, mistakes or errors of judgment, improper advice or trial strategy in connection with a case are ordinarily insufficient to justify setting aside a judgment of conviction. See *Dusseldorf* v. *Teets,* Cal., 209 F.2d 754, *certiorari* 347 U.S. 969; *U. S.* v. *Camsion,* Miss., 84 F.Supp. 289; *U. S.* v. *Sumpter,* N.Y., 111 F.Supp. 507, *affirmed* (C.A. 2) 228 F.2d 290; *Barber* v. *United States,* Okla., 227 F.2d 431. There are many other citations from all jurisdictions to the same effect. However, most courts considering the question of incompetency of retained counsel are generally agreed that the judgment of conviction is invalid when counsel's representation has been so inadequate as to make a mockery of justice, thereby denying the accused a fair trial (due process of law) in invading his constitutional right to the effective assistance of counsel. Thus, a judgment of conviction will not ordinarily be held invalid on the basis of inexperience or unskillfulness of retained counsel or on the basis of lack of preparation, improper advice, or errors of judgment on his part. *Lotz* v. *Sacks,* 292 F.2d 657; *Lunce* v. *Overlade,* 244 F.2d 108; *State* v. *Johnson* (Mo.), 336 S.W.2d 668. But where counsel's representation of the defendant is so lacking in intelligence, and competence, as to reduce the trial to a farce and a mockery of justice, the judgment will be

declared void as an invasion of defendant's constitutional right to the assistance of counsel. *O'Niell* v. *Tahash* (Minn.), 324 F.2d 18; *O'Malley* v. *U. S.* (Ohio), 285 F.2d 733; *In re Croft*, 145 Cal.App.2d 155, 302 P.2d 61; *People* v. *Strader*, 23 Ill.2d 13, 177 N.E.2d 126; *Rice* v. *Davis* (Ky.), 366 S.W.2d 153; *Wyatt* v. *State*, 243 S.C. 197, 133 S.E.2d 120. Also see 74 A.L R.2d 1403, Section 4(b).

In the case of *Abram* v. *State* (1950), 228 Ind. 179, 91 N.E.2d 358, the Court said:

> "The right to be heard by counsel provided by Section 13 of Article I of the Constitution of Indiana, as well as the due process clause of the 14th Amendment, can not be nullified by the appointment of incompetent counsel who gives merely perfunctory or casual representation." *Rhodes* v. *State*, 199 Ind. 183, 156 N.E. 389.

This right is not defeated merely because an accused himself employs incompetent counsel who affords inadequate representation. *Sanchez* v. *State*, 199 Ind. 235, 157 N.E. 1. Nor is this constitutional protection waived because the accused in fact may be guilty. The safeguards erected by the Constitution are intended to protect the rights of all citizens alike. They protect the rights of the guilty as well as those of the innocent. *Batchelor* v. *State*, 189 Ind. 69, 125 N.E. 778. As was stated by Chief Justice Stone, "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded to inflict merited punishment on some who are guilty." *Ex Parte Quirin*, 317 U.S. 1.

In the case of *Rice* v. *Davis* (Ky.), 366 S.W.2d 153, the attorney for the defendant failed to require a court reporter to transcribe the trial proceedings. His petition for writ of

habeas corpus was denied by the State Court of Kentucky and he applied to the United States District Court for the Western District of Kentucky, on the question of whether the defendant had adequate representation by counsel at his trial. The District Court for the Western District of Kentucky stated:

> "It is immaterial whether such counsel was appointed by the Court or selected by the accused, in the absence of facts constituting a waiver of the right. The prejudice to a defendant from the failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused. The right is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Court further stated:

> "Effective representation by counsel, in order to satisfy accused's constitutional right to fair trial, is a rule of law that has been strictly construed, and must mean representation so lacking in competence that it becomes duty of court to observe such condition and correct it. Allegations of serious mistake on part of attorney, standing alone, even where harm results, are not ground for habeas corpus."

In all the cases decided on this subject, the circumstances surrounding the trial must be such as to shock the conscience of the court and make the proceeding a farce and a mockery of justice. See *Diggs* v. *Welch*, 148 F.2d 667. In this case *(Rice* v. *Davis)*, the Supreme Court of Kentucky reversed the judgment of conviction and issued a writ of habeas corpus.

In the case of *State ex rel. Parker* v. *Jameson*, 75 S.Dak. 196, 61 N.W.2d 832, the Court said:

> "A lawyer whether paid or not, whether unsympathetic and unbelieving in his client's case or not, whether the offense alleged is abhorrent or in high disfavor with the current public view or not, is bound by the ethics of his profession and our judicial system to present the cause of the deserving and the despicable defendant with equal zeal. Only thus can this right, written into our constitutions, be made a reality.
>
> "See also Lunce v. Overlade (1957, CA7 Ind) 244 F.2d 108, 74 ALR2d 1384, later app 261 F.2d 351; where the court points out that while a defendant who proceeds to trial with counsel of his own choice usually cannot complain that there was a denial of due process because of mistakes made by his counsel, nevertheless the fact that counsel was employed by the defendant is no longer significant when the representation was so lacking in competency as to reduce the trial to a sham, so that it then became the duty of the state to see that the essential rights of the accused were preserved by appropriate intervention."

CONCLUSION

There is no parallel in the above cases cited wherein courts have granted a new trial because the defense in those cases was a farce and a mockery of justice with the instant case. Nowhere in any of the cases cited or in other cases scanned by the writer of this brief has the defense counsel stood mute, thereby not only making an ineffective defense, but no defense at all. If ever there was a farce and mockery of justice as interpreted by the various jurisdictions of this country, the conduct of the trial of this case has magnified the meaning of farce and mockery of justice.

Both the Sixth and Fourteenth Amendments to the Constitution were violated. The conscience of the courts have been shocked. In this petition for rehearing, these petitioners were not seeking a vindication without trial, but are seeking to have a trial, and it is submitted to this Honorable Court to this date, they have never received a trial. The jury that convicted these defendants heard only one side and were prohibited by their attorney from making a defense which in most cases would be more than adequate to uphold an outright acquittal.

It can truthfully be said that these petitioners were not convicted for anything but stupidity in a serious error in their own judgment in permitting their attorney to act as he did. This is not a facetious statement, but is borne out by the actions taken at the purported trial. It is respectfully submitted that all that is being asked by these petitioners is the opportunity to present a defense and have their case decided on all the facts, circumstances, and events and not a one-sided partial résumé which was only the prosecutor's side of the coin.

Therefore, these petitioners respectfully pray that this Honorable Court grant a writ of certiorari herein in order that these petitioners may obtain a new trial and have their day in court as guaranteed them by the Sixth and Fourteenth Amendments to the Constitution of the United States of America.

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January, 1970

APPENDIX

EXHIBIT I

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 26 1969
ANDY PAYNE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

E. K. BEARDEN,]
Plaintiff in Error,]
-vs-] No. A-14,752
]
THE STATE OF OKLAHOMA,]
Defendant in Error.]

-SYLLABUS-

1. The granting or denial of a motion for continuance is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of that discretion.

2. The trial court did not err in refusing to grant a continuance when the continuance was claimed because of the illness of counsel and the court noted the fact that several prior continuances had been granted and that at the last term the accused was put upon notice that he must procure other counsel, if present counsel was then still sick.

3. A defendant who proceeds to trial with counsel of his own choice, after refusing court-appointed counsel, knowing that the attorney intends to remain mute, and does not intend to cross-examine State's witnesses or offer any evidence in defense, cannot thereafter claim that he was denied due process of law.

[APPENDIX]

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY, OKLAHOMA, HONORABLE KENNETH SHILLING, JUDGE.

E. K. BEARDEN was convicted of the crime of Manslaughter in the First Degree, was sentenced to 15 years in the State Penitentiary, and appeals. JUDGMENT AND SENTENCE AFFIRMED.

J. B. CHAMPION, JR., Ardmore, Okla.
Attorney for Plaintiff in Error,

G. T. BLANKENSHIP, Attorney General
BURKE MORDY, District Attorney,
Attorneys for Defendant in Error.

OPINION BY BRETT, P.J.
BUSSEY, J. and
NIX, J. Concur.

TOM BRETT, P.J.:

Plaintiff in error, E. K. Bearden, hereafter referred to as defendant, was tried by a jury in the District Court of Carter County on a charge of murder, but was found guilty of the lesser offense of manslaughter in the first degree. On October 26, 1967, the jury returned its verdict and assessed punishment at fifteen years confinement in the state penitentiary. After the verdict was returned and accepted by the trial court, the court announced that judgment and sentence would be passed at nine o'clock A.M. on October 30, 1967.

On the date set for passing judgment and sentence, the defendant was present in court, but his defense counsel failed to appear; so, the trial judge continued the imposition of judgment and sentence until the following November 6th. On November 3rd, through his defense counsel, defendant filed a Motion for New Trial setting forth nine citations of error, to which was attached affidavits of persons who could have, but did not testify in defendant's behalf. On November 6th, defendant's motion for new trial was

overruled, and judgment and sentence was imposed as assessed by the jury. Defendant served his notice of appeal and was permitted to remain free on bail.

This appeal has caused this Court considerable concern. In this case defense counsel intentionally refused to offer a defense for his client, because he was suffering from stomach ulcers. Consequently, it is contended that defendant was denied due process of law, as guaranteed by both the Constitution of the State of Oklahoma and the Constitution of the United States. However, when the record is considered in its entirety, it becomes apparent that if there was an absence of due process, it came about as the result of defendant's own choice, which was made with full knowledge of the consequences, and with knowledge of the proceedings which were being undertaken. In short, if such condition existed, it was of defendant's own making and not that of the trial court or the district attorney.

Defendant recites three propositions in his brief, which was submitted to the Court "out of time." Those propositions state, as follows:

1. "It is fundamental error and in violation of due process to force a trial to proceed and allow a conviction to stand when it is known that the defendant has a good and sound defense which was not presented and where it is further known that the jury never really heard the true facts."

2. "It is basic error where the district attorney knows of facts favorable to the defendant and withholds the same from the jury permitting it to reach its verdict without being so advised."

3. "The record shows over and over that the trial judge in this case was prejudiced against counsel, defendant and that by his forcing the trial through when he knew that the defendant had a side to present and good solid defense, he committed reversible error."

[APPENDIX]

The State's brief was provided by the District Attorney for the 20th Judicial District, who also prosecuted defendant. It is not necessary to set forth verbatim the two propositions contained in the State's brief.

This Court can take judicial notice of the fact that this defendant is no stranger to criminal trial proceedings. He has been in this Court on several occasions. Also, defendant's knowledge of what was transpiring is reflected in the record by defendant's actions and conversations with the trial judge, prior to and during the trial. Likewise, this Court has full knowledge that the defense counsel is a capable attorney of considerable experience in criminal law, as well as being a most capable trial lawyer.

The record reflects that there seemed to be little doubt in the trial judge's mind that defense counsel was experiencing some physical difficulty, because of his stomach ulcers; and we likewise accept that premise from the record. But we also observe that the trial judge offered proper admonishment to defense counsel which was consistent with that provided by counsel's personal physician; and that counsel's condition was the cause for the first two continuances of the trial.

However, with such knowledge and understanding by and between the parties to this trial, we must consider that both the trial judge and the defense counsel have certain duties and responsibilities to perform. Some are specified by the canons of judicial and professional ethics, while some are provided by law. Failure to perform those duties on the part of either party hampers the trial proceedings. Consequently, it must also be determined in this case, whether or not either party failed in that respect.

We consider first, defendant's proposition one, which contends: that he was denied due process of law because he was forced to trial, convicted and subsequent thereto, the trial court denied his motion for new trial; all of which constituted reversible error. For the Court to provide an

answer to the proposition we must look to the record before the Court. We observe also, that defendant attached, as an exhibit, to his brief the transcript of defendant's preliminary hearing. However, insofar as the transcript is not presented as a part of the casemade the Court is not bound to consider the same. But notwithstanding that fact, we have reviewed that transcript also.

Proceeding further with defendant's first proposition, we consider defendant's effort to further postpone his trial, by his *third motion for continuance* because of counsel's illness, and the trial court's action in denying that motion. Clearly the question is one concerning whether or not the trial judge abused his discretion in denying the motion. It is defendant's position that since he filed the motion for continuance, it was error for the court to deny it, because it was premised upon counsel's illness. In substance at least, it appears from the record to have been counsel's position that insofar as he had been hired to defend the accused man, and had conducted the investigation of the facts, that he was the only attorney capable of representing this defendant.

We observe the crime was committed December 25, 1966; defendant had a preliminary hearing on January 5, 1967, and was bound over to stand trial in the district court, on the charge of murder.

The case was set down for trial for May 17, 1967, during the next term of court after the crime was committed. A few days before the date set for trial defendant filed his first motion for continuance based upon his counsel's condition of health. Attached to the motion was the affidavit of Dr. Clark, counsel's personal physician. The affidavit stated that counsel would not be able to engage in a "controversial trial or a contested case" for a period of approximately thirty days. The affidavit set forth that counsel was suffering from "ulcers." The affidavit seemed quite sufficient, so the case was stricken from the docket. The case was subsequently set for trial for September 20th,

which was in the second term of court after the initial complaint was filed.

On September 18th, two days before the trial was to commence, defense counsel filed a second motion for continuance which was also supported by the affidavit of his personal physician. The trial judge conducted a hearing on the second motion at which the doctor testified concerning counsel's "ulcers." Defense counsel also testified and was subjected to cross-examination. However, at the conclusion of that hearing, the trial judge reserved his ruling on defendant's motion until that afternoon. The judge required that defendant be present with his counsel when he made the ruling on defendant's motion. [Another defendant represented by the attorney in another capital case was also required to be present. See: *Crumb* v. *State*, Okl. Cr. — P.2d —.] On the afternoon of September 18, defendant and his counsel were both present. The trial judge advised all parties of the Court's position in the matter, and before sustaining defendant's motion for continuance stated, in part at pages 131 and 132 of the casemade, as follows:

> THE COURT: Let the record show present at this time, Mr. E. K. Bearden and Mr. Ernest Crumb, are present in court, with their attorney, Mr. J. B. Champion. And I would advise them, the reason they were requested to be here was not for the purpose of trying them, or anything of the kind, but because the court was not willing to make a ruling, a definite ruling in their cases without them being present to know what was being done. I am not going to ask you any questions at all. But I do want to advise each of you that your cases were set for trial on the May docket, as I am sure you are both aware, and that at that time your attorney, Mr. Champion, filed a motion for continuance, with an affidavit by Dr. Frank Clark attached, saying, . . . that Mr. Champion had ulcers and it would endanger his life if he were to try a case at that time. That was filed in each of your cases, and I believe in one other case, at that time. . . .

(Continuing on pages 133, - 137).

As a result the cases were set over on to this docket, and this docket was set on August 17th, . . . Mr. Champion has filed another motion for a continuance, which is almost—not exactly, but almost identical with the one filed back in May: that he has ulcers and that it would endanger his life to try the case.[1] We had a hearing on them up here for about an hour or so, and after we heard it I told both counsel that I would not rule on it without you gentlemen present and know what was going on. You are present now, and the court is now getting ready to rule on them. Frankly, and I told Mr. Champion, privately that when this happens on successive times makes me think that this is just a method to try to get out of going to trial. I am not convinced yet that it is not. But frankly, the doctor is here and testified, and quite frankly he testified that he didn't know for sure whether he had one or not, but if he did have that it might be dangerous for him to go ahead and try the case. Frankly, I don't want to take a chance on anybody's life. . . . In any event the court has determined that the motions will be sustained at this time, that the cases will be set over for trial at the earliest opportunity—I wish I could tell you when, but I can't. . . . But I wanted you all to understand what we are doing and why. The cases are being continued at this time. They will be re-set at the earliest opportunity. Now, I can't tell you when that will be. It may be thirty days or it may be sixty, But *I am telling you now, that whenever it is you will be expected to be*

[1]The record reveals that at the hearing on the motion for continuance the doctor stated that defense counsel should remain quiet, follow a strict diet, and present himself at the Scott-White Clinic at Temple, Texas, for a complete examination. He testified further, that his diagnosis of defense counsel's ulcers was based upon the patient's past record and what counsel had presently told him, but that he did not make x-rays or take a blood-count.

here ready to go to trial, whether with Mr. Champion or some other lawyer. . . . And I want you all to understand that the continuance is being granted, but on the condition that this is the last one. There will be no more. And that whenever the court sets it in the future, which may be thirty days or sixty days, and it might not even be until next January, I can't tell at this time. I haven't had a chance to review the docket and see what the possibility was. But whenever it is, you will be expected to be ready to go to trial at that time. If Mr. Champion is not ready then it will be up to you to have you an attorney, whether it be you or somebody else. . . . But what I want you all to understand is that you've gotten your last continuance. Now don't misunderstand me, if one of you is on the way down here for trial and somebody runs over you in a car and nearly breaks your neck and they take you in the hospital, well certainly I am not going to say that I am not going to give you a continuance. But it is going to have to be something along that line, or other reasonable causes—I think you understand what I am trying to say. (Emphasis Added).

MR. CRUMB, the defendant [in another case]: Yes.

MR. BEARDEN: Yes sir.

Subsequent to the foregoing admonition from the trial judge to the defendant and his legal counsel, on October 11th counsel filed an instrument styled: "Renewed Motion to Disqualify Judge Shilling." The motion recites many things which counsel contends is personal dislike for him, and prejudicial to defendant. In response and on the same day defendant filed his motion, the district attorney filed a Motion to Strike. Both motions were set down for hearing on October 20th.

On October 20th defense counsel filed his *third motion for continuance* setting out, "That counsel for defendant is ill." Attached to the motion was an unverified

copy of a report from Radiological Consultants Associated, Garland, Texas, in support of said motion. The judge set the pending motions for hearing at one-thirty P.M. October 23rd.

According to the record, at the appointed time on October 23rd, neither the defendant nor his defense counsel appeared. The court waited until approximately one-fifty six P.M. for defense counsel to make his appearance, when the judge overruled defendant's motion for continuance and motion to disqualify, and sustained the district attorney's motion to strike.

However, the reporter's note in the casemade reflects that at 2:35 P.M. the defendant and defense counsel appeared in open court. The record recites, (C.M. 170): ". . . Court reconvened in open court to again consider the matters in this case, and the defendant, E. K. Bearden was present in person, *and his attorney, J. B. Champion, Jr., was also present, having walked into the courtroom wearing an open-necked short sleeve shirt, and no coat or tie;* . . ."[2] (Emphasis added).

A lengthy hearing was had when defense counsel vigorously argued his motion for continuance, and took the witness stand and testified in support of his motion, based on his condition of health. The district attorney objected to the medical report for the reason that it was not verified. Thereafter the Judge reiterated that the two previous continuances had been granted for the same reason, and he reminded counsel of the court's previous admonition given to him and the defendant relative to the case going to trial. Defense counsel offered a different version, but when the defendant was asked by the court concerning the matter, the defendant admitted that what the court said was correct.

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[2]This action became the basis for one of defense counsel's citations for contempt of court, as his attire was in violation of the Standing Rules of the Court.

At that point in the hearing the following took place between the court and defendant: (C.M.-192.)

"THE COURT: Do you have another attorney to represent you?"

MR. BEARDEN: No sir.

THE COURT: Are you in a position to hire another attorney to represent you?

MR. BEARDEN: No sir, I am not.

THE COURT: Have you made any effort to do so?

MR. BEARDEN: Well, your Honor, under the circumstances, not only myself but my family has gone in debt to hire this one. We still don't have that paid off yet, the debt that we have undergone in order to afford this one.

THE COURT: Have you made any effort to secure the services of another attorney to go to trial?

MR. BEARDEN: I don't feel that another attorney— (interrupted)

THE COURT: I didn't ask you how you felt. Have you made any effort?

MR. BEARDEN: No, I haven't. I want to tell you my reason why I haven't.

THE COURT: *Very well, do you desire the court to appoint you one?*

MR. BEARDEN: *No sir.*

THE COURT: Very well, are you ready to go trial?

MR. BEARDEN: If I can try my own case. Your Honor I am ready to go to trial at any time I can be fairly tried. I feel like if I am given a fair trial they will set me free. (Emphasis added).

Shortly thereafter—during the same hearing—defense counsel announced to the court, (C.M.-198)

> "MR. CHAMPION: . . . *I will be here with these boys, but I am not going to stand and defend them. And I am going to instruct them to stand mute,* because I am not able to defend them. . . . These are not strong cases, as the county—district attorney well knows."
>
> THE COURT: That's the one point on which I agree with you, Mr. Champion. (Emphasis added).

Near the conclusion of the hearing the Judge advised all parties, by saying, "The defendant, E. K. Bearden, is instructed to be present Wednesday morning at 9:00 o'clock ready to proceed to trial." When the judge concluded, defense counsel stated: "It will be through very early. There won't be a question asked by me, or E. K. won't take the stand." Subsequently, the defendant stood trial commencing October 25, 1967, with defense counsel of his own choice being present, contending he was too ill to properly act as defense counsel.

When the case was called for trial, the State announced ready, but defense counsel refused to make any such announcement. When the docket was completed, defense counsel demanded that his latest motion for continuance be considered. The district attorney entered his demurrer to defendant's motion for continuance, and the court commenced to hear argument on the district attorney's demurrer.

The record reveals, commencing at page 124 and continuing to page 230, that approximately fifteen pages is devoted to defense counsel's argument concerning his condition of health and what transpired. During the whole period, the court continued to insist that the argument was concerning the district attorney's demurrer to the motion for continuance. Finally, at the conclusion of the argument the demurrer was sustained, and the judge again ad-

monished defendant personally, that due to the previous announcements of his defense counsel *the court would appoint counsel to represent him if he desired to accept such offer. For the second time defendant refused* the trial court's offer to appoint counsel for him. Thereafter, considerable other argument occurred before the jury was called for voir dire.

Defense counsel refused to participate in the selection of the jury; but notwithstanding, the district attorney challenged several prospective jurors because they indicated they had already formed an opinion concerning defendant's case.

At the conclusion of the voir dire, the State proceeded to present its witnesses. However, defense counsel refused to even attempt to cross-examine the state's witnesses. The second witness called by the State, Mrs. Hazel Wagoner, was not present even though the State issued a subpoena for her to testify. Mrs. Wagoner is the divorced wife of the man whom defendant was charged with having killed; and she was one of the witnesses present when the shooting occurred.

On the second day of trial, the State again called for Mrs. Hazel Wagoner to testify, but for the second time she was not present in court. The State then placed Mr. Wayne Warthen, crinimal investigator in the district attorney's office, on the stand to testify. Mr. Warthen testified that about six twenty-six P.M. the previous night, after court had recessed, he observed the defendant and Mrs. Wagoner together. When the defendant attempted to personally ask a question of the witness, the district attorney objected to defendant's acting as his own counsel, with retained counsel being present. The court sustained the objection, but defendant insisted that his question should be answered. Excerpts of the record thereafter are as follows:

THE COURT: Mr. Champion?

MR. CHAMPION: I will state this to your Honor, the prosecution has got a book there of information taken

in the preliminary hearing of this case. The side he has presented to this jury—

MR. MORDY: I am going to object to a speech now, your Honor.

MR. CHAMPION: Well, I don't care whether you object or not, but you presented a side—

MR. MORDY: Objection has been sustained, Mr. Champion.

MR. CHAMPION: Oh, I am sure it has.

THE COURT: Mr. Champion, you are entitled to ask the question in behalf of your client, and apparently your client desires the question be asked. Do you care to ask the question of this witness, or not?

MR. CHAMPION: I told this Court yesterday that I didn't feel—

THE COURT: I didn't ask you what you had told me, I asked you if you cared to ask a question of this witness or not?

MR. CHAMPION: I am not going to take the life of a defendant in my hands when I am not able to represent him and when I am sick.

THE COURT: Would you answer my question, do you desire—

MR. CHAMPION: I've answered it all I am going to, your Honor.

MR. BEARDEN, the defendant: Mr. Mordy, the public defender, doesn't care for the truth—

(REPORTER'S NOTE: The jury retired to the jury room out of the hearing of the proceedings in the courtroom and thereupon the following proceedings were had in the courtroom out of the presence of the jury, to-wit:)

THE COURT: Ask Mr. Mordy to come back in here (speaking to bailiff).

THE COURT: (After return of Mr. Mordy to the courtroom.) I just excused the jury, Mr. Mordy. I have some things I desire to settle at this time. Now, Mr. Bearden, when we started the trial of this case, in fact several days before and again before we started it, the Court advised you that he was not able, and you insisted that he appear and be your attorney, apparently, and he has insisted that he is your attorney, and is appearing. Now, as long as you have an attorney sitting there, under the rules of the court he is the one that is supposed to ask the questions and make the objections, and things of that kind. I think that it has become apparent to you that he has not.

MR. BEARDEN, the defendant: Sir, I am sorry, your Honor, for anything I've done. I have realized all that. I am fully aware of it. But, human nature, when I get shot at, or when I get kicked, I hit right back and just as fast. And I can't help that. It is something inherited in me. And I try not to. I do my best not to. And I am sorry for it. I apologize to the Court, and I apologize to anybody else for it. It is vengeance of mine. But, uh, I can't help mine. And when somebody shoots at me, or somebody kicks me, I always manage to shoot back or fight back, or kick back, whatever—whatever is necessary to—and I can't help that.

THE COURT: Well, as long as you are in this court, you are going to conduct yourself properly, and so is your attorney.

MR. BEARDEN, the defendant: I am going to try my best, YOUR Honor.

THE COURT: Now, your attorney says the he is not able. I am inclined to agree with that. However, it is strange to me that he is able to get up and make a speech attacking the court and district attorney ever

so often, but is not able to answer a simple question about whether he has an objection or not, or a question which you apparently want to ask the witness.

MR. BEARDEN: I've seen movies of men on the battlefield, that were sick, would get up—would try to get up and fight, even after they was down.

THE COURT: Well, that has nothing to do with the proceedings here. We are going to try this case as best we can, and it was your and Mr. Champion's election that you proceed with him sitting there.

MR. CHAMPION: Not our election. We presented motions to you, that in all good conscience, if you had desired this boy to be fairly protected, you would have granted him the time.

THE COURT: I have made every effort to do that, and have offered to grant him time.

MR. CHAMPION: Well, in the first instance, when Mr. Mordy came in here—Mr. Cook, I don't recall which—I believe it was Mr. Cook. He said: "Oh," he said, "where are the X-ray or radiology reports?" And he berated the Doctor. He berated me. Well, I've had two X-rays, I've had four hemorrhages, and I am not able to try it, and there is no time in God's world that is as important as seeing that a man gets a fair trial. You put him on a schedule, why I've explained to you that no other lawyer could get this stuff, you appoint him a court appointed attorney, give him some time. What does he get? $250.00 from you on a case no telling what the specialists get. Got people in Oklahoma City, things like that. Now, that's not fairness.

THE COURT: I am not interested in your opinion on the subject, Mr. Champion. I am pointing out that the election is yours and your client's. *Even at this point, I would declare a mistrial and appoint an attorney to represent the defendant, if he requests it.* (Pause.) But

if you insist on appearing and going ahead as the lawyer in the case, you are going to conduct yourself properly, and so is the defendant. (Emphasis added).

MR. CHAMPION: I am going to stand by this boy as long as his mother and E. K. wants me to stay.

MR. MORDY: Let's proceed, your Honor.

THE COURT: Are you ready to proceed, Mr. Bearden? You understand what I have said?

MR. BEARDEN: Yes sir, your Honor. I apologize, and I will do my best, to conduct myself properly.

THE COURT: You understand that you do have the right to ask questions, and cross examine witnesses, and make objections, but as long as you've got an attorney present, he is the one that is supposed to do it.

MR. CHAMPION: This attorney has advised you, that in all conscience I could not conduct a good cross-examination.

THE COURT: Mr. Champion, if that is true then in good conscience you ought to resign and give your client's money back, and withdraw from the case.

MR. CHAMPION: Your Honor, I made that same offer to you and counsel yesterday. I said, "Let him have some time, if I am not ready within a reasonable time, to allow me to get well—don't tell me that's not true. And what you said to me, and I told them that I would reimburse him for what he had paid, because I want fairness for him. I do not want him railroaded on a one car track.

THE COURT: You said you would do so sometime in the future, if you decided in the future that you were not able, and that's not—good enough.

MR. CHAMPION: I told you a definite date. I told you when my next X-ray was. I would advance the date.

Anything to see that he gets a fair trial. Judge, I would like to ask your Honor, do you think that E. K. has had a fair trial?

THE COURT: *The only thing that has interfered with his having a fair trial, Mr. Champion, if he has not has been yourself.* (Emphasis added)[3]

* * * * * *

THE COURT: In all fairness to the defendant, are you ready to proceed under the present circumstances, Mr. Bearden?

MR. BEARDEN: Yes sir. I will try to conduct myself properly.

THE COURT: *Well is it your desire to continue with Mr. Champion as your counsel throughout this trial?*

MR. BEARDEN: *Yes sir.* (Emphasis added).

THE COURT: Very well. Call the jurors back in.[4]

Thereafter the trial continued and the State rested its case. When the court asked defense counsel if he desired to put on any defense, counsel continued to stand on his illness and refused to call any witnesses or to make any defense whatsoever. Subsequently the court recessed to prepare the instructions for the jury. After they were prepared defendant offered no objections to the court's instructions, and requested no special instructions to be given. Immediately after the instructions were read to the jury defense counsel read into the record his demurrer to the evidence. The prosecutor made his closing argument to the jury, but defense counsel declined the opportunity to make any statement for the benefit of the jury. The jury returned a verdict finding defendant guilty of manslaughter in the

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[3]C.M. 348-353

[4]C.M. 355

first degree and assessed his punishment at fifteen years imprisonment.

We have considered the record in this case very carefully for the reason that the substance of defendant's contentions are that he did not receive due process of law. After considering all things contained in the record we reach the same conclusion stated by the trial judge, when he informed defense counsel, "The only thing that has interfered with his [defendant's] having a fair trial, Mr. Champion, *if he has not*, has been yourself."

In substance, defendant's first proposition contends the lack of due process of law only because the prosecutor allegedly failed to present facts favorable to defendant. From the record before the Court it is most apparent that the prosecutor subpoened the principal witness, but she did not appear. And it is also apparent that defendant and defense counsel both knew where and how to obtain her presence, but did not do so. The defense counsel has a duty to present facts favorable to his client, which counsel did not do in this case. At this stage of the proceedings, it is too late to claim "foul," when the infractions were committed by defendant himself—through nonfeasance by legal counsel of his own choice.

Likewise, defendant's second proposition is based upon the same premises and is without merit.

The third proposition contends prejudice of the trial judge which resulted in the court forcing the trial through to a conclusion, whereby the trial court committed reversible error. As we view the record, the trial judge was merely performing his judicial duty to afford defendant a trial, according to law. There might be some merit to this contention were it not for the fact that on at least three separate occasions the judge offered to appoint counsel for defendant, but he chose to refuse each offer made by the court. This Court's consideration is confined to the record before the Court, and it is apparent that this complaint is

based purely upon defense counsel's personal beliefs. Even if such were true, it would not have justified the position taken by counsel, that of making no defense whatsoever. Defense counsel's contention of stomach ulcers and the trial court's insistence that the trial proceed is not sufficient to prove such alleged prejudice. Like any other contention of error, proof must appear in the record. We observed from the record also, that at no time did defense counsel take advantage of the admonitions given him by both the trial judge, and counsel's personal physician. There is nothing in the record to show that counsel sought hospitalization for his condition of illness. We might add, that had he done so he would be in a much better position than the record presently reflects him to be in.[5]

We feel constrained to accept the authority cited in the State's brief concerning illness of defense counsel. In *Mixon* v. *Geogia*, (1890) 85 Ga. 455, 11 S.E. 874, the Supreme Court of Georgia sustained the trial court's action in denying further continuance of trial, after defendant had been put on notice that he must procure other counsel if his present counsel continued to be ill, when the time for trial arrived. In that case, as in the instant case, defendant had been granted several previous continuances on the premises of counsel's illness. Consequently, we must conclude that the trial judge did not abuse his authority when he denied defendant's last motion for continuance in this case.

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[5]Defense counsel made several ex parte appearances in this Court, when he explained how he was required to leave the courtroom to attend the men's room to vomit; that when he did, he vomited blood. But, counsel also related that he had vomited blood on numerous occasions prior to the time of trial. Consequently, there is little doubt that both he and his client were most aware of his condition. Since the judge put them both on notice, it was incumbent upon them to make proper arrangements for defendant's trial, but neither of them seemed to consider the situation serious. It is important to note also, that each time counsel made his ex parte appearance the only assurance he received was that this Court would review the record to determine whether or not the defendant received due process of law.

We must state further, that the record reveals that the trial court made every effort possible to assure that this defendant received a fair trial and due process of law; and we believe that he did. As recited hereinbefore, even at the time for defendant to put on his defense—immediately prior to the time the State rested its case—the court offered to declare a mistrial and appoint counsel for defendant in order that the witnesses might, at least, be cross-examined; but defendant refused the court's offer. Under circumstances as in this case, we know of no authority which assigns the responsibility to the trial court to insist—let alone demand—that a defendant accepts its offer of appointment of counsel. This is especially so, when the defendant is reasonably intelligent, experienced in the criminal process of law, and knowingly refuses the court's offer, as defendant did in this case.

We are aware that the practice of law is an arduous profession and sometimes gruelling, and especially in a criminal trial when the charge is murder. While our sympathy goes out to any lawyer whose health cripples his professional activities, we are of the view that counsel in this instance did not sufficiently discharge his professional responsibility to his client notwithstanding his condition of health. Illness may constitute a reason why a lawyer fails to expedite his business, but his professional responsibility to his client may, in some instances, far outweigh any consideration of the attorney's health. But for the facts: that both defense counsel and his client [defendant herein] were well aware of the attorney's physical condition; that the trial court had granted several continuances because of the attorney's condition of health; that both the defense counsel and the defendant were put on notice that the case would be tried the next time it was placed on the court docket; that even during the trial the court offered to declare a mistrial and appoint counsel for defendant; and that with full knowledge of the situation, the possible results and consequences defendant personally refused the trial

court's offer to appoint counsel to effectively represent him; but for these facts, we would be compelled to take a different view of this case. However, considering the totality of the circumstances we can see no justifying reason to warrant the reversal of this case.

The evidence presented the jury was clearly sufficient to sustain the verdict of first degree manslaughter.[6] And we are of the opinion that the defendant received a fair trial and due process of law, even though under adverse circumstances. We find further, that such adverse circumstances were of the making of the defendant and defense counsel of his own choice, and not as the result of the actions of the trial court.

After having carefully considered the record and briefs submitted in this case, we are of the opinion that the judgment and sentence of the District Court of Carter County in this case should be, and the same is therefore, affirmed.

JUDGMENT AND SENTENCE AFFIRMED.

OPINION BY BRETT, P.J.
BUSSEY, J. and
NIX, J. Concur.

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[6]The facts presented to the jury revealed that the defendant was at the home of Mrs. Hazel Wagoner, in violation of a district court order; that he fired a shotgun at James Madison Wagoner, Jr. which caused the death of said person; and that the said Wagoner fired several shots into the house from a carbine rifle. The State did not presume to offer any defense for the defendant, nor did the State attempt to withhold any evidence.

Any defense to be offered to prove an act of homicide to have been either excusable or justifiable, under Title 21 O.S.A. §§731 and 733, is a matter for the defendant to present. It is not sufficient for defense counsel to "lay behind a log" and do nothing, expecting the prosecution to explain the defendant's actions.

EXHIBIT II

F I L E D
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 26 1969
ANDY PAYNE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ERNEST W. CRUMB, Plaintiff in Error,	]	
-vs-	]	No. A-14753
THE STATE OF OKLAHOMA, Defendant in Error.	]	

-SYLLABUS-

1. The granting or denial of a motion for continuance is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of that discretion.

2. The trial court did not err in refusing to grant a continuance when the continuance was claimed because of the illness of counsel and the court noted the fact that several prior continuances had been granted and that at the last term the accused was put upon notice that he must procure other counsel, if present counsel was then still sick.

3. A defendant who proceeds to trial with counsel of his own choice, after refusing court-appointed counsel, knowing that the attorney intends to remain mute, and does not intend to cross-examine State's witnesses or offer any evidence in defense, cannot thereafter claim that he was denied due process of law.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY, OKLAHOMA, HONORABLE KENNETH SHILLING, JUDGE.

ERNEST CRUMB was convicted of the crime of Manslaughter in the First Degree, was sentenced to serve 25 years in the State Penitentiary, and appeals. JUDGMENT AND SENTENCE MODIFIED TO FIFTEEN YEARS AND AFFIRMED.

J. B. CHAMPION, JR., ARDMORE, OKLAHOMA, Attorney for Plaintiff in Error,

G. T. BLANKENSHIP, ATTORNEY GENERAL, BURKE MORDY, DISTRICT ATTORNEY, Attorneys for Defendant in Error.

OPINION BY BUSSEY, J.,
TOM BRETT, P.J. Concurs,
NIX, J. Concurs.

BUSSY, J.:

Ernest W. Crumb, herein after referred to as defendant, was charged in the District Court of Carter County with the offense of Murder; he was found guilty of Manslaughter in the First Degree, and from the judgment and sentence assessing his punishment at imprisonment in the State Penitentiary for a term of 25 years, he appeals.

This case was set for trial by jury on the 23rd day of May, 1967, but a motion for continuance was filed by the defendant wherein it was stated that the defendant's attorney, because of ulcers, would be unable to engage in a "controversial trial or a contested case" for a period of approximately thirty days. This motion for continuance was sustained and the case was passed to the next docket. The case was then set for trial by jury on the 22nd day of September, 1967, and on the 18th day of September, 1967, the attorney for the defendant filed a new motion for continuance in which he once again alleged that he was unable

to try the matter because of illness resulting from ulcers. The motion for continuance was sustained after the court heard testimony and thereafter, in open court, the following proceedings were had: At page 105 of the case made:

"(REPORTER'S NOTE: As to this case of State vs. Ernest W. Crumb, the Court then recessed, but later in the afternoon Mr. Champion appeared in the district court room with his two clients, E. K. Bearden and Ernest W. Crumb, and Court reconvened and the following occurred. This being late afternoon of September 18, 1967.)

THE COURT: Let the record show present at this time; Mr. E. K. Bearden and Mr. Ernest Crumb, are present in court. with their attorney, Mr. J. B. Champion. And I would advise them, the reason they were requested to be here was not for the purpose of trying them, or anything of the kind, but because the court was not willing to make a ruling, a definite ruling in their cases without them being present to know what was being done. I am not going to ask you any questions at all. But I do want to advise each of you that your cases were set for trial on the May docket, as I am sure you are both aware, and that at that time your attorney, Mr. Champion, filed a motion for a continuance, with an affidavit by Dr. Frank Clark attached, saying, well in essence * * *"

Page 107 of the case made:

"THE COURT: * * * Mr. Champion has filed another motion for a continuance, which is almost—not exactly, but almost identical with the one filed back in May; that he has ulcers and that it would endanger his life to try the case. We had a hearing on them up here for about an hour or so, and after we heard it I told both counsel that I would not rule on it without you gentlemen present and know what was going on. You

are present now, and the court is now getting ready to rule on them. * * *

Page 109 of the case made:

"THE COURT: * * * But I wanted you all to understand what we are doing and why. The cases are being continued at this time. They will be re-set at the earliest opportunity. Now, I can't tell you when that will be. It may be thirty days or it may be sixty. But I am telling you now, that whenever it is you will be expected to be here ready to go to trial, whether with Mr. Champion or some other lawyer. * * * And I want you all to understand that the continuance is being granted, but on the condition that this is the last one. There will be no more. And that whenever the court sets it in the future, which may be thirty days or sixty days, and it might not even be until next January, I can't tell at this time. * * * But whatever it is, you will be expected to be ready to go to trial at that time. If Mr. Champion is not ready then it will be up to you to have you an attorney, whether it be you or somebody else. Now, do either of you have any questions to ask? * * * I think you understand what I am trying to say.

MR. CRUMB, the defendant: Yes.

MR. BEARDEN: Yes sir."

The case was set once again to be tried by jury on the 26th day of October, 1967, and on the 20th day of October, 1967, the attorney for the defendant filed a motion for a continuance in which he again stated that he was ill and unable to proceed with the matter. On the 23rd day of October, 1967, the motion of the District Attorney to strike the motion for a continuance, as well as certain other motions, were sustained by Judge Shilling. On the 23rd day of October, 1967, the defendant's attorney filed a motion for a continuance in which he once again alleged that he was too ill to proceed

in the case. The motion for continuance was heard by the Court on the 23rd day of October, 1967, and at page 166 of the case made the following appears:

"THE COURT: And your case has been set for Thursday, I believe it is?

MR. CRUMB: Yes sir.

THE COURT: Will you be ready for trial at that time?

MR. CRUMB: No, I won't be ready. Of course I've been ready all the time, and my lawyer hasn't been ready.

THE COURT: Have you made any effort to get another lawyer?

MR. CRUMB: No sir.

THE COURT: Did I call your attention to that fact at the last hearing, that—

MR. CRUMB: Yes sir.

THE COURT: Are you able to hire another lawyer?

MR. CRUMB: No sir.

THE COURT: Do you desire the Court to appoint you a lawyer?

MR. CRUMB: No sir, I don't.

THE COURT: Do you expect to handle your own case?

MR. CRUMB: I don't think I could do that. I'm a mechanic, not a lawyer.

THE COURT: That was the point I was making. You were advised about a month ago that your case would be set for trial, and that you would be expected to be ready, and if you needed another lawyer you were expected to have him ready. Is that true? Do you desire the court to appoint you a lawyer?

MR. CRUMB: I didn't figure any other lawyer knew anything about the case anyway.

THE COURT: Do you desire the Court to appoint you a lawyer?

MR. CRUMB: No.

THE COURT: Very well. I think I have advised both of you—the only thing I haven't advised you—and I probably ought to do that—.

MR. CRUMB: I done paid one lawyer all the money I got.

THE COURT: Well, that's the only thing that entitles me to appoint you one, if you desire to have another one, the fact that you don't have any money left to pay one with, that would authorize me to appoint you one and have him paid out of the court fund. I asked you if you wanted me to appoint you an attorney? (Pause) You still say you do not?

MR. CRUMB: No, I don't want another lawyer. I done paid one lawyer, that is the one I want.

* * * * * * *

MR. CHAMPION: * * * I will be here with these boys, but I am not going to stand and defend them. And I am going to instruct them to stand mute, because I am not able to defend them. * * *"

The case came on for trial by jury on the 26th day of October, 1967, and before the trial the court stood in recess, and the Judge, the District Attorney, the defendant and his attorney, J. B. Champion, Jr. and the Reporter, retired to the court's chambers. At page 192 of the case made, the following appears:

"THE COURT: The Court here advised you a month ago that you were going to trial when the other continuance was granted. Now, your attorney is still not able, and there is no assurance as to when he will be able.

THE DEFENDANT: I didn't figure on getting another attorney. Another attorney wouldn't know about the evidence that was presented down there or the investigation that has been made, so it wouldn't make much difference anyway as far as another attorney is concerned, wouldn't be of any good to me anyway.

THE COURT: Well, do you want me to appoint you an attorney?

THE DEFENDANT: No, I don't think it would be worth a penny to me.

THE COURT: Have you been familiar with what has transpired in the case we have just been trying?

THE DEFENDANT: No, I don't do anything but just work.

THE COURT: Are you wanting to go to trial and have him sit there like he has done the last day and a half, and not participate in the trial?

"THE DEFENDANT: Well, whatever he thinks about the thing. I done paid him $2,500.00. I can't pay anybody else that much. Whatever he wants to do. I guess if he wants to sit there, he will just have to sit there. If we are going to have a trial anyway, just have it.

THE COURT: There are a couple of other alternatives. I could appoint you an attorney and give that attorney a continuance for him to prepare himself,

MR. CHAMPION: At $250.00.

THE DEFENDANT: I don't want another attorney. He has spent a lot of time on this thing.

THE COURT: He said he is not able. He has said it two times when this case was previously set for trial. He says it now, he is not able. He has said it for the past two days. If we go ahead, it is the Court's ruling, or it will be, we will go on to trial, unless you want me to appoint you an attorney and get you another lawyer,

in which event the Court would consider a reasonable request for a continuance for that attorney to prepare for trial. * * *

* * * * * *

THE DEFENDANT: I would like to get it over with.

THE COURT: If we go ahead and conduct it properly, and the defendant's attorney, as far as I can tell, is trying to do his best—well, I will try to do mine.

THE DEFENDANT: I think I can get a fair and impartial trial. I don't have any animosity. No malice."

Defendant urges that the trial court erred in overruling his Motion for Continuance, thus forcing the defendant to trial with an attorney too ill to properly and adequately represent him. While there is some evidence in the record tending to indicate that the attorney for the defendant had peptic ulcers, they seem to have only flared up after the case was set for trial. Significantly, although counsel for defendant was diagnosed as having ulcers, he was never hospitalized for them and indeed, although he was allegedly suffering great pain and nausea from them, they apparently did not prevent him from filing numerous motions for continuance and other motions to disqualify the trial judge, nor did they prevent him from vigorously arguing them before the court and appearing as a witness in support of said motions. The defendant was well aware of the alleged illness of counsel and although advised by the court to be prepared for trial either with counsel or another counsel, he never sought to retain one; nor, indeed, did he accept the court's offer to appoint counsel for him on several occasions. Moreover, on the very day of the trial, when advised by the court of the fact that defense counsel had sat mute for a day and a half in a trial prior to the instant case, the defendant again refused the judge's offer to appoint counsel and elected to proceed to trial knowing that counsel would remain mute and that he [the defendant] had been instructed to remain silent.

We have repeatedly held that the granting or denial of a motion for continuance is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless for an abuse of that discretion. Although the factual situation here presented is rather unique, our sister State of Georgia considered almost the identical situation in *Mixon* v. *State* (1890), 86 GA 455, 11 SE 874, wherein a continuance was claimed because of the illness of counsel and the court noted the fact that several prior continuances had been granted and that at the last term the accused was put upon notice that he must procure other counsel, if present counsel was then still sick. In that case the judgment of the lower court was affirmed.

Upon the record before us it is abundantly clear that the trial court did not abuse its discretion in overruling defendant's Motion for Continuance, for from the pleadings filed by counsel for the defendant and his various appearances before the court, the trial court had ample opportunity to observe the attorney and determine whether he was capable of representing the defendant. Moreover, the striking pattern of counsel's alleged illness occurring when this case was set for trial, must have led the trial court to conclude that the Motions for Continuance were merely for the purpose of delay since the defendant was at liberty on bond, and apparently gainfully employed. The fact that counsel for defense elected to stand mute during the trial and failed to cross-examine the State's witnesses, is to us no proof of his will*ness* or inability to represent the defendant, but was apparently a tactical decision whereby he hoped to arouse the jury's sympathy,[1] or at least lay the framework for the alleged claim of denial of due process on appeal should the defendant be convicted, as indeed he was.

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[1]Appearing in the case made at page 203, after Dr. Frank W. Clark had testified on direct examination by the State, counsel was asked if he desired to cross-examine, and he stated, "Well, I am not going to cross-examine the doctor. You are the doctor who stated that I should be in the hospital?" Objection. Sustained.

This leads us to a consideration of the defendant's allegation that the District Attorney suppressed or concealed evidence from the jury that the State's principal witness, and mother of the deceased, who was present at the homicide and testified as to the facts and circumstances surrounding it, was a person of bad reputation and a heavy drinker, and had given conflicting statements concerning the homicide. Such allegation is not supported by the record and is specifically denied by the District Attorney who presented to the jury the testimony from which it could be reasonably ascertained that this witness had on the night in question, drunk a considerable quantity of intoxicating liquor. Ample opportunity was given to cross-examine this witness, but the defendant elected not to do so. Moreover, the prosecuting attorney, in his closing argument to the jury, stated that the witness was "not an articulate person," nor "any past president of the P.T.A." We accordingly find this assignment of error to be wholly without merit.

Defendant further argues that had all the facts been presented to the jury, he would have been acquitted. Certainly, he was given every opportunity to give these facts to the jury, but elected not to do so, and the mere fact that the trial judge prior to trial, stated his opinion that from the little he knew of the case it was a weak one, does not support this allegation. The jury had before them testimony that after a few heated words the defendant stabbed the deceased with a hunting knife which inflicted a wound in the abdominal area and the testimony of Dr. Clark who stated that the cause of death was from bleeding as a result of the wound inflicted, there is not one scintilla of evidence which tends to any degree to raise the defense of self-defense. We must therefore hold that the evidence amply supports the verdict of the jury and the judgment and sentence appealed from must be accordingly affirmed; however, in the interest of the proper administration of justice, we take judicial notice of the case of Bearden v. State, Okl. Cr., — P.2d —, in which that defendant was sentenced to

only 15 years imprisonment for a similar crime and under similar circumstances.

We are therefore of the opinion that the judgment and sentence herein should be modified from 25 years to 15 years imprisonment, and as so modified, the judgment and sentence is AFFIRMED.

TOM BRETT, P.J. Concurs,
NIX, J. Concurs.

EXHIBIT III

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 8 - 1969
ANDY PAYNE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

E. K. BEARDEN,]
Plaintiff in Error,]
-vs-] No. A-14,752
]
THE STATE OF OKLAHOMA,]
Defendant in Error.]

- ORDER DENYING SECOND PETITION FOR REHEARING -

NOW on this 7th day of October, 1969, this Court having carefully examined the Petitions for Rehearing and Briefs filed herein in the above styled and numbered cause, and being fully advised in the premises, is of the opinion that said Second Petition for Rehearing should be, and the same is hereby, DENIED.

WITNESS OUR HANDS and the seal of this Court, this 7th day of October, 1969.

Tom Brett

TOM BRETT, PRESIDING JUDGE

Hez J. Bussey

HEZ J. BUSSEY, JUDGE

Dissents

KIRKSEY NIX, JUDGE

ATTEST:

CLERK

EXHIBIT IV

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 8 - 1969
ANDY PAYNE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ERNEST W. CRUMB, Plaintiff in Error,
-vs-
THE STATE OF OKLAHOMA, Defendant in Error.
No. A-14,753

ORDER DENYING SECOND PETITION FOR REHEARING

NOW on this 7th day of October, 1969, this Court having carefully examined the Petitions for Rehearing and Briefs filed herein in the above styled and numbered cause, and being fully advised in the premises, is of the opinion that said Second Petition for Rehearing should be, and the same is hereby, DENIED.

WITNESS OUR HANDS and the seal of this Court, this 7th day of October, 1969.

Tom Brett
TOM BRETT, PRESIDING JUDGE

Hez J. Bussey
HEZ J. BUSSEY, JUDGE

Dissents
KIRKSEY NIX, JUDGE

ATTEST:

CLERK

AFFIDAVIT

STATE OF OKLAHOMA)
) SS.
COUNTY OF CARTER)

I. E. K. Bearden, of lawful age, after being duly sworn, depose and state:

That during the month of May, 1966, I started seeing Hazel Wagoner, who was divorced from the deceased, James Wagoner. That after I started seeing Hazel Wagoner, James Wagoner when drinking would make threats against my life and threats against the life of Hazel Wagoner and her children. These threats were communicated to me both personally by James Wagoner and through other people. On several occasions Hazel Wagoner would call me to come to her house for the purpose of protecting her against being beaten by James Wagoner. This went on from May until December of 1966. On December 23, 1966, I was in the home of Hazel Wagoner. I was there with her children and her father when James Wagoner came in and started fighting. He knocked me down, kicked me and beat me for a considerable length of time. All during this beating, he was threatening to kill all of us. Hazel Wagoner was scared of him and had asked me to stay there at the house because of the threats of James Wagoner. On Christmas Day, 1966, between 3:00 and 4:00 o'clock P. M., he started circling Hazel Wagoner's house and just before dark got out of the car with a rifle. He walked toward the house with a gun, and just before he got to the porch, he shot 2 or 3 times barely missing Hazel's father. I grabbed a shotgun and fired towards Wagoner. He continued firing the gun and I did not know I had hit him. He shot 5 or 6 more shots at the house. I moved into the kitchen thinking that James Wagoner was coming in. I did not know that I had hit him. The police arrived and told me to come out and I refused until I was sure that Wagoner was in custody. Once I knew

he was not able to fire another shot, I stepped out on the front porch and was taken in custody by the Ardmore Police.

Although it is true the trial judge had warned me that I was going to trial whether my attorney was able to represent me or not, and although the trial judge offered to appoint an attorney for me, my attorney, J. B. Champion, Jr., continually warned me against the use of a court appointed attorney. He stated that it would mean a sure conviction and that the only way I could gain an acquittal was to "stick with him". He convinced me that I was in no danger at all by sticking with him, but would receive a long penitentiary sentence if he did otherwise. I had spent all my money on his fee and was unable to hire another attorney at the time. Mr. Champion had a good reputation for winning criminal cases and I felt I could do nothing else but depend upon his judgment. During the trial, I attempted to represent myself in cross-examining witnesses, etc., but was prevented from doing so by the trial judge since Mr. Champion was there in the Court Room with me. He chose to stand mute and did not examine the jurors, cross-examine any of the State's witnesses, put on any witness on my behalf and did not let me take the stand. He also refused to argue the case to the jury. Although I was ready at all times to go to trial on this case, my attorney would ask for a continuance because of his own personal reasons.

I firmly believe that my life was in danger and I used reasonable means to defend myself under the circumstances.

The above is a true and correct statement.

E. K. Bearden

E. K. BEARDEN

Subscribed and sworn to before me this 10th day of June, 1969.

Darlene Hargues

NOTARY PUBLIC

My Commission Expires:
Sept. 12, 1970

(SEAL)

STATE OF OKLAHOMA)
) SS.
COUNTY OF CARTER)

AFFIDAVIT

Ernest Crumb, of lawful age, after being duly sworn, deposes and states:

That on this date, I am 56 years old and will be 57 years old in September of 1969. At the time of my altercation with Tommy Carlton, I was 54 years old. I had known Tommy Carlton for 3 or 4 years prior to January 1, 1966. On January 1, 1966, he was 27 years old; 5 feet 8 inches tall and weighed 180 or 185 lbs. I had known his mother, Dorothy Patton, for about 4 years prior to that date. I had also known her other sons, Derril, Blackie and Johnny. I had been training them to be mechanics for about 7 years. I had started work with Derril when he was about 16 years old; with Blackie when he was about 14 years and Johnny when he was about 10 years old. I gave them money to go to school on all during this time. Blackie works for me full time now and Johnny works for me after school. I got Derril a job with Joe Brown Company the other day, but he did work for me for one year after this altercation. All three of these boys told me that they knew that it was not my fault; that it was just one of those things and they did not hold anything against me for what happened on January 1, 1966.

Dorothy Patton, the mother of Tommy Carlton, is a well known police character. She drinks with various men

and when they become intoxicated, she takes their money. She has done this to me for at least half a dozen times for a period of about 4 years. I never dated her except when I was drinking and she would somehow look me up and one thing lead to another.

On December 31, 1965, I was working with Dorothy Patton's son, Derril. We worked until about 8:00 that night. I had been working 15 or 16 hours a day for three weeks prior to December 31. At about 8:00 P. M. on December 31, I told Derril that I believed I would have a drink and after tonight, would not drink any more. We had a drink and about that time, his mother, Dorothy Patton, came in the shop. Derril left and I believe Dorothy and I had one or two more drinks there at the shop. Derril came back with his wife and Tommy about 9:30. We got in my car and Derril was driving. We went out to Bosco's, a place near Gene Autry, and stayed there for a few minutes and came back to Jim's Alibi. We stayed there for about 10 minutes and I went back to the shop to change clothes. We then went back out to Bosco's and stayed there until about 11:30 or 12:00 Midnight and then went by the Palomino Club where we stayed about 15 minutes. We left there at approximately 12:30 and Derril drove us on back to my shop. We got in the shop and I told them they could go where they wanted to go, but I was going to bed. I fell in bed with my clothes on and thought that everyone had left. About 1:00 A. M., I was awakened by Dorothy Patton, who was trying to get something out of my pocket. I woke up and told her to get the hell out of there, and about that time, I was hit in the head by the fist of Tommy Carlton. I did not know Tommy was even in the room when he hit me. He hit me again before I could get up and when I did get up, I hit Tommy with my fist. I had a 4:10 gauge shotgun leaning against the wall and Tommy grabbed the shotgun. I tried to wrestle the shotgun away from him and he pushed me back against a chest of drawers. My right hand fell on a hunting knife that I had lying on top of the chest and I made one swipe at him with the knife and evidently stabbed him in the side.

Tommy ran out the front of the shop and I then ran his mother, Dorothy, out and locked the doors. I called the police station and told them what had happened and in about 10 minutes Wayne Warthen and two or three policemen knocked on the door and I let them in. I gave them the knife and the shotgun and told them what happened. They took me to jail and the next morning, I was informed by Wayne Warthen that Tommy Carlton had died as a result of being stabbed.

At the preliminary hearing, Dorothy Patton testified that when I woke up, she was across the room trying to use the telephone and that she was not near me or trying to get anything out of my pocket. She testified that the reason her son hit me was because I was cursing her and that no one was trying to do anything to me or get anything out of my pocket. However, since that time, she has told me, and has made an affidavit that is now in the possession of J. B. Champion, Jr., that her testimony at the preliminary hearing was false by threat of death by her brother for her and her son, Derril, but that she would now testify to the truth which was that she was actually trying to get something out of my pocket when I awoke and told her to get out.

The above statement is true and correct, so help me God.

Ernest W. Crumb,

ERNEST CRUMB

Subscribed and sworn to me before this 28th day of April, 1969.

Darlene Hargues

NOTARY PUBLIC

My Commission Expires:
Sept. 12, 1970

(SEAL)